No. 14928.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

Jurisdiction.

This is an action for copyright infringement. Jurisdiction of the district court was invoked under 28 U. S. C. Sec. 1338(a) on the ground that this cause arises under the Copyright Laws of the United States. [R. 3, 36.] Judgment was entered May 23, 1955. [R. 88-91.] Notice of Appeal was filed June 21, 1955. [R. 91-92.] This Court has jurisdiction under 28 U. S. C. Sec. 1291.

Statement of the Case.

Pleadings. This is an action for copyright infringement in which appellee seeks to enjoin appellants from the performance of a parody or burlesque of appellee's

copyrighted motion picture "Gaslight." The complaint also contained a count for unfair competition. No damages were asked. [R. 1-25.] A temporary restraining order was granted against the production and performance of the purported infringing work entitled "Autolight" [R. 10], and, as subsequently modified [R. 25], it remains in effect. Appellants filed answers [R. 28-43] which denied the infringement but admitted that in 1952 appellant Columbia Broadcasting System (CBS) had produced, appellant American Tobacco Company had sponsored, and appellant Benny had performed a burlesque of "Gaslight," and that the defendant proposed to remake the burlesque under the title "Autolight" on film and televise it in the future. The answers set up as affirmative defenses the claim that "Autolight" was an original burlesque of "Gaslight," that the use made of the motion picture was a fair use and not a copying, and that the burlesque did not and would not detract from the picture or satisfy in whole or in part any demand for the picture.

Evidence. The case was tried upon a stipulation of facts [R. 47-75], exhibits, and the testimony of one witness, Dr. Frank C. Baxter of the English Department of the University of Southern California. [R. 111-188.] The stipulation shows that in 1944 appellee Loew's had produced, copyrighted, and released an hour-and-forty-minute feature motion picture under the name of "Gaslight." The motion picture, which featured Charles Boyer, Ingrid Bergman, and Joseph Cotten, was based upon a play variously called "Gaslight" or "Angel Street," written by appellee Hamilton. The picture was produced at a cost of $2,500,000 and exhibited to approximately 25,000,000 people in America and 27,000,000 people

abroad. Its domestic showing was concluded in 1946. The picture [Ex. 2] was viewed by the Court.

In 1945, appellant Jack Benny, a well known radio and television comedian, had presented on his radio program a burlesque or parody of the motion picture "Gaslight" in which appellees cooperated to the extent of furnishing a print of the picture so that the studio audience (which in this case was an Army group) could see the picture before attending the broadcast. A recorded transcription and a script of that broadcast were introduced as Exhibits 6 and 7. On January 27, 1952, Miss Barbara Stanwyck and Benny were featured in a live television skit on the Benny program which was a burlesque of the motion picture "Gaslight." The television broadcast had been contemporaneously filmed (a "television kinescope recording"), and the recording was introduced in evidence as Exhibit 8 and was viewed by the Court. A copy of the script was introduced in evidence as Exhibit 9. Loew's thereafter notified CBS of its objection to the television broadcast as an infringement of its copyright. CBS took the position that the broadcast was a burlesque or parody which did not infringe Loew's copyright.

In early 1953, CBS and Benny determined that one of the Benny television programs for the 1953-1954 series, would be a filmed reproduction of the 1952 live broadcast of the parody or burlesque of "Gaslight."* A print

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*Loew's learned of the proposal through a trade paper announcement and immediately sought and secured the restraining order against the production or performance of the parody or burlesque. Since so much had already been invested in preparation for the program (about $60,000), the Court modified its restraining order to permit its filming and printing, but restrained the proposed use as a television broadcast pending trial of the action.

of the filmed reproduction was introduced in evidence as Exhibit 10 and was viewed by the Court. A copy of the script used in its making was introduced as Exhibit 11.

Dr. Baxter's testimony at the trial was that of an expert in the field of literature and especially parody and burlesque. Also introduced in evidence as exemplars of Benny's custom were scripts of some of his radio burlesques of other pictures [Exs. 4A-4D, incl.] and the "cutting continuity" of the particular motion pictures so burlesqued [Exs. 5A-5D, incl.]. Certain literary works were also introduced [Exs. 16-17].

The Works Involved. In the Appendix hereto, there is set forth a synopsis of the motion picture "Gaslight" and of the allegedly infringing parody or burlesque, "Autolight." However, in any copyright infringement case the ultimate comparison must be between the very works themselves. The nature of the issue here makes this even more important than in most infringement actions. Neither scripts nor synopsis—nor the description of opposing counsel or expert witnesses—can begin to give a true picture. For that reason, appellants will make the necessary arrangements in order that this Court may view the works at its convenience.

Opinion of the Trial Court. After the matter had been submitted and briefed, Trial Judge Carter rendered an opinion for the plaintiff on May 6, 1955. This opinion

is reported in 131 F. Supp. 165.* In his opinion Judge Carter concluded "that parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, *i.e.,* what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists." 131 F. Supp. at 183. On this question of fact, the Trial Court held that "If this was the ordinary plagiarism case, without the defense of burlesque as a fair use, it would be crystal clear, under the controlling authorities, that there had been access, a substantial taking and therefore infringement." 131 F. Supp. at 172. Judge Carter held that the parody or burlesque was not authorized under the doctrine of fair use, which he said should be given very narrow scope if the use was solely for "commercial gain." 131 F. Supp. 173-176, 183. The burlesquer or parodist, under the holding of the Trial Court, may lawfully use an "isolated incident, character, event, theme or setting" from the original, but he may not use "the whole or a substantial part of the copyrighted material." 131 F. Supp. at 185.

Findings, Conclusions, and Judgment. Findings of fact, conclusions of law, and judgment were entered on May 20, 1955. [R. 76-91.] The Court found [F. VIII

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*Through inadvertence, the opinion was omitted from the printed Record. It is being printed as a Supplement to the Record but the printing is not yet completed. Citations herein will be to pages of the Federal Supplement.

and XII] that both the 1952 and proposed 1953 burlseque television programs were copied in substantial part from the motion picture "Gaslight" and that the copying was not a fair use, nor made fair by reason of the fact that the material was used in the creation of a burlesque or parody [F. XV]. It concluded [C. 2] that this was an infringement of copyright. The court found no unfair competition. The judgment [R. 88] enjoined the further performance of both television programs and ordered that the prints thereof be delivered up to the Clerk for destruction. The count for unfair competition was dismissed. No attorneys' fees were ordered.

Specifications of Error.

1. The Court erred in finding that the television programs [Exs. 8 and 10], or either of them, were copied by defendant CBS in substantial part from the motion picture photoplay "Gaslight."
2. The Court erred in finding that any part of the said motion picture appearing in said television programs, or either of them, was a substantial part of said motion picture.
3. The Court erred in finding that the copying and use by defendants of the copyrighted material of plaintiff was not or is not a fair use of such material.
4. The Court erred in finding that any such copying or use was not made fair by reason of the fact that said material was used by defendants in the creation of a parody or burlesque.
5. The Court erred in concluding that defendants had infringed plaintiff's copyright.

Summary of Argument.

I.

Burlesque and parody have a long and honorable history as useful arts. From the time of the Greeks, the greatest works of art and literature have been regularly burlesqued or parodied by other leading artists or writers. Since 1741 when Sir Henry Fielding's *Shamela* made sport of Samuel Richardson's *Pamela,* few books or dramas in English have escaped the humorous thrusts of eminent burlesquers and parodists such as Thackeray, Bret Harte, Weber and Fields, Thurber, and Corey Ford. Although burlesque and parody are well established traditions in every field of art, this is the first case squarely presenting the question whether a copyright holder can prevent the use of his protectible material in the independent creation of a burlesque or parody of the copyrighted work. This is a question of immense practical importance, for the survival—at the very least, the vigor —of the literary art of burlesque and parody is dependent upon the decision.

II.

A. The power of Congress to enact copyright legislation is subject to the command that only such rights may be granted as will, in the words of the Constitution, "promote the Progress of Science and useful Arts" (Art. I, Sec. 8). Reflecting that fact, a copyright holder does not acquire the right to prevent uses of his work which promote the progress of science and the useful arts for the

public benefit. This well-established doctrine of "fair use" is illustrated in a number of types of cases. Closely analogous to the case at bar is the right of literary critics and reviewers to make a fair use of protectible material in their work. While various factors are involved in determining what is a "fair use," the unifying element is the constitutional provision under which courts approve bona fide uses of copyrighted material in connection with the dissemination of knowledge or the forwarding of a useful art.

B. Burlesque and parody are entitled to the full benefits of the doctrine of fair use. They constitute a useful art, for they are a kind of literary criticism and they also entertain. In the creation of a burlesque or parody just as in literary criticism, the use of a pre-existing work is absolutely essential, for the burlesque or parody has no point unless there is an "original" to be compared and contrasted. Since practically all fair uses (including literary criticism) result in financial gain to the author, the fact that burlesques and parodies are written for money is no barrier to the right of fair use. Nor can the story line automatically be excluded from the permissible fair use, for use of it may be reasonably necessary for the creation of the new and independent work, as it often is in literary criticism.

C. Although the issue presented here has never before been squarely decided, the English and American cases which have adverted to the question of burlesque and parody recognize the right of fair use for that purpose.

American textbooks and treatises also uphold the right of fair use for the parodist and burlesquer.

D. The burlesque "Autolight" is a fair use of "Gaslight." The authors of "Autolight" necessarily had to use the recognizable elements of "Gaslight" but they took no more than was appropriate for their purpose. In using the bare bones of "Gaslight," "Autolight" used much less than did the contemporaneous reviews in periodicals, and indeed much less than many of the burlesquers in literary history have used of their "originals." The resulting burlesque was a new, independent, and completely different literary work in the field of a useful art.

III.

The Federal Copyright Act of 1790 has been repeatedly amended to expand the protection given to writers and other artists. However, Congress has never acted to prevent the publicly accepted custom of burlesque and parody of copyrighted works, and this congressional acquiescence is a clear indication that Congress had no intention of preventing such custom. Among people in the literary field, there has also been widespread acquiescence in the understanding that the burlesquer and parodist have a right to a fair use of protectible material. This acquiescence constitutes an interpretation of the statute which is entitled to substantial weight.

ARGUMENT.

I.

Introduction.

A. The Importance and Novelty of the Case.

The opinion of the trial court states that "The case presents novel questions in the law of literary property and is a case of first impression. It presents a major issue. . . ." 131 F. Supp. at 167. That issue is: Does the legal monopoly created by the Copyright Act include the right in the copyright proprietor to prohibit or control the use of his otherwise protectible material in the independent creation by another author of a burlesque or parody of the copyrighted work?

This is the first time that this issue has been squarely presented for reported court decision in either the United States or England. This is true despite the fact that the distinct form of literary art which we call burlesque or parody is more than 2000 years old and the fact that since the invention of printing there has been an increasing number of published burlesques and parodies directed toward particular literary works. Although authors of books have been given copyright protection in England since 1719* and in America since 1790** and authors of plays have had the same protection in England since 1833*** and in America since 1856,**** nevertheless the question presented here has never before been decided.

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*Act 8 Anne c. 19.

**Act of May 31, 1790; 1 Stat. 124.

***Lytton Act, 3 and 4 Will. 4, c. 15.

****Act of Aug. 18, 1856; 9 Stat. 106.

The importance of the issue is very great. While the particular case involves the burlesque or parody of a motion picture by a television program, the issue is vastly broader. Parody and burlesque cover the whole field of arts—novels, short stories, plays, poetry, non-fictional works, essays, treatises, the graphic arts as represented by cartoons and caricatures, even music. In each class we find an established tradition of burlesquing original creations, and the burlesquer inevitably uses substantially more of the original than he could otherwise legitimately borrow were he creating a new work of the same type as that of the original. This case raises the vital question: How far at this late date ought that tradition be curbed by the courts?

Essential to a resolution of this novel and important issue is a familiarity with the nature of burlesque and parody, and their long history as art forms. Thus, as a background for the legal argument, we turn to these matters.

B. The Nature of Burlesque and Parody.

Burlesque and parody constitute a wide *genre* lying within the realm of comedy and covering all of the arts.* The essence of this *genre* is that the artist seizes upon some well known "original" and through distortion, in-

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*There is little purpose to be served in pursuing the differentiation, if any there be, between "burlesque," "parody," and "travesty." The scholars themselves have not settled upon a definition of the terms. Dr. Baxter's definitions are found at R. pp. 113-115; see R. pp. 147-152. For other definitions, see Shepperson, "The Novel in Motley," Harv. Univ. Press. 1936, pp. 4-8 (hereinafter cited as "Shepperson"), Kitchin, "Survey of Burlesque and Parody in English," Oliver & Boyd, 1931, pp. xx-xxiii (hereinafter cited as "Kitchin"), Carolyn Wells, "A Parody Anthology," Scribners 1904, Introduction.

version, exaggeration, and the application of the art of inducing mental contrast turns the seriousness of the original into laughter. The Encyclopaedia Britannica defines the *genre* as "a form of the comic in art, consisting broadly in an imitation of a work of art with the object of exciting laughter, by distortion or exaggeration, by turning, for example, the highly rhetorical into bombast, the pathetic into mock-sentimental, and especially by a ludicrous contrast between the subject and the style."

Broadly speaking, the original may be anything—an institution (*e.g.,* the church, the state, a political party); a philosophy, religion or belief; mankind itself. From such wide generalities, the artist may range in his selection of the "original" down to the very particular—an individual person, a special event, or a particular work of art or literature. This type of comedy is found in all arts. There are burlesques in music, in painting, in sculpture, and of course in literature and the drama.

There are certain essentials for a literary burleque or parody. By definition there must be an "original."* [R. 114.] The original almost inevitably must be serious, or at the very least, take itself seriously, because the burlesquer produces his comic literary result by mental contrast. Equivalently, the original must be known to the burlesquer's literary audience if the burlesque or

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*Where the "originals" are selected from the fields of literature or drama, the burlesques or parodies may be of two subclasses: (1) *general,* as of a school or type of writing or of the style or general type of writing of a particular author, or (2) *particular,* directed at a specific work of a specific writer. Shepperson, p. 7; Kitchin, p. xxii. This case, of course, involves a "particular" parody or burlesque, and the use of the words "burlesque" or "parody" herein refers to a work in which the original is a specific literary creation of a specific author.

parody is to be effective as a burlesque.* Consequently, the original is almost invariably a work currently familiar, including in that term the eternal classics.

The art of the burlesquer or parodist is first to recall to the mind of his audience the original with all of its seriousness and especially the particular traits of the original at which he aims his burlesque. He does this by the use of one or more, or all, of such elements of the original as the title (usually comicalized), setting, characters, style, "message," important incidents, story line, "treatment and development," climax, and any other distinctive features of the original. He does not *take* these elements as his own. Quite the contrary. He tries in every way to impress on his audience that *these* belong to the author of the original. He says in effect, "Remember, this is what the author of the original did; recall the effect it had upon you."

Then the burlesquer, by the application of his own creative talents, by means of distortion, inversion and exaggeration (often, if not usually, including slapsticks) and all the other comic arts, *transforms* that effect into

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*This is not a requirement imposed by some abstruse scholar. About a year after Poe's "Raven" was first published, a country lawyer in Springfield, Illinois, received a parody of that poem from a friend. He replied in part:

"April 18, 1846.

"Friend Johnston:

"Your letter, written some six weeks ago, was received in due course, and also the paper with the parody. It is true, as suggested it might be, that I have never seen Poe's 'Raven,' and *I very well know that a parody is almost entirely dependent for its interest upon the reader's acquaintance with the original.* . . .

"Yours truly,
A. Lincoln"

("The Living Lincoln", ed. Angle & Miers, Rutgers Press, 1955, p. 86.)

its exact opposite. And what makes the result funny—and hence effective—is *not simply the additions* which the burlesquer has provided in the way of isolated comic tricks, but *it is the very act of the tranformation* of that particular original with its particular tone and effect into something so different. The accomplishment of that transformation in the minds of his audience is the burlesquer's art.

A burlesque or parody is not solely and simply a humorous work. It is inevitably a critique of the original. By making certain aspects of the original laughable, it causes the audience to have some mental question as to whether those traits were really as serious and solemn as they seemed. It is not always intended as "literary criticism" (although it often is); nor is it always destructive or so intended (for it usually is not), but it causes the reader to take a second look at the object burlesqued. Its nature as criticism in this sense is acknowledged by all authors.*

C. The History of Burlesque and Parody.

Knowledge of the art in ancient times is of course fragmentary, although we know it existed from the early

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*Dr. Baxter so testified [R. 144] Kitchin declares (p. ix) that "burlesque as [is] a serious art, a long-established mode of criticism, which is often far more incisive, and certainly more economical than the heavy review to which the public has been accustomed since the days of Dryden." Professor Falk states, "Parody is both a form of literary humor and a branch of criticism." ("American Literature in Parody," Twayne, 1955, p. 13.) Judge Yankwich says, "In essence, both parody and burlesque are criticisms. . . ." ("Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Rev. 1130, 1131 (1955).)

days of Greek literature.* Furthermore, as might be expected, until the invention of printing and consequent wide dissemination of books, burlesques were mainly of generalities, such as institutions, beliefs, people, and the like. There were few familiar "originals" in literature to burlesque. But beginning in the 18th century the type of burlesque here under scrutiny—the type which selects a particular work as its original and applies to the *protectible* elements in that work the peculiar art of the complete transmutation of those elements into something entirely new and delightfully comic—came into its own and has progressively burgeoned ever since.

The earliest famous English burlesque of this type remains probably the best. Samuel Richardson's "Pamela" (1740) is usually considered the first English novel. Its general popularity was astounding. In this long work of approximately a thousand pages Richardson tells a story of a poor but virtuous girl who is forced by circumstances to take up a position in the house of Lady B. Lady B's son, Lord B, is a wealthy but completely dissolute young man who has designs upon Pamela's virtue. The entire book consists in the main of a series of letters from Pamela to her mother, describing in detail Lord B's pursuit and her evasion. In fact, someone has said that the book recounts the most sustained attempted seduction in

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*There is extensive literature on the subject of burlesque and parody. Excellent works include Kitchin, "Survey of Burlesque and Parody in English," Oliver and Boyd, 1931; Shepperson, "The Novel in Motley; A History of the Burlesque Novel in English," Harvard University Press, 1936; Baddeley, "Burlesque Tradition in the English Theatre" (London, 1952). Judge Yankwich has an excellent short history in his article entitled "Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Rev. 1130 (1955).

literary history. At the conclusion of an involved series of incidents forming the plot, Pamela's virtue triumphs, and Lord B attains his end result only after he has been thus compelled to enter into the bonds of matrimony with her.

If Richardson is considered the first English novelist, his contemporary, Sir Henry Fielding, is often considered the greatest. Fielding was a hard-headed lawyer, subsequently a judge, who had an amazing knowledge of human nature. He was disgusted with the hypocrisy of "Pamela" and in 1741 published anonymously "An Apology for the Life of Mrs. Shamela Andrews," better known simply as "Shamela." It is a little book of approximately 1/20th the length of the original. He used the identical plot and story line, the same cast of characters and the same style of telling his tale by letters from his heroine to her mother as was used by Richardson. However, his heroine, Shamela, was quite the opposite from Pamela; far from being innocent and virtuous she knew quite well the ways of the world (having already been the mother of at least one illegitimate offspring), but she put on mock virtue for the sole purpose of snaring the dissolute young heir, who, by the way, became Lord Booby instead of Lord B. Fielding used Richardson's story; taking off from it he produced a priceless burlesque. As Shepperson says (p. 23), "The letters forming the main body of the burlesque are *an outline of the important scenes and incidents in Pamela.* But the author has been able to alter completely the spirit

and meaning *without changing more than a few of the facts."**

While there were many other burlesques and parodies during the 18th century, their number greatly increased in the 19th century. Practically every famous writer was then burlesqued or parodied, and many of the best authors wrote burlesques or parodies of others. In Shepperson's work, he has an appendix-bibliography of 30 pages listing many more than a hundred burlesques of novels in English literature which appeared between 1830 and 1900. We stop here to note only a few of the better known literary burlesques and parodies during this period.

Jane Austen in "Northanger Abbey" (1797) burlesqued the mood, part of the story line and the important incidents in Mrs. Radcliffe's "Romance of the Forest" (1791), and "The Mysteries of Udolpho" (1794). Thackeray wrote a series of "Novels by Eminent Hands" in which he burlesqued Disraeli, Bulwer-Lytton, Lever and others. Thackeray also wrote "A Legend of the Rhine" (1845) as burlesque of Dumas' "Othon l'Archeur" (1840) in which he used the entire story line of the "original," almost incident by incident. M. G. ("Monk") Lewis' famous Gothic romance, "The Monk" (1791), was ridiculed in a burlesque entitled "The New Monk" by "R. S. Esq.," in 1798. By this burlesque, as Shepperson says

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*This burlesque receives full discussion in Shepperson's work. Kitchin, after calling "Shamela" probably "our best prose parody," (p. 169) says, "Its cruel cunning lies in the way the author, who perfectly realizes the vulgarity of Richardson's creation, has dogged the footsteps of his victim, using time and again the very language of the original and gently tilting every equivocal situation or speech into downright vice or depravity."

(p. 161), "almost every character and incident of the original is turned into ridicule." Francis Burnand, the famous editor of "Punch," and Henry J. Byron made their living writing parody-burlesques of current popular works. Many of their burlesques were written for the stage.*

Bret Harte has been ranked as one of the "world's best practitioners of the art" of parody and burlesque.** He wrote several series of "Condensed Novels" between 1867 and 1871 burlesquing famous contemporary authors. Three deserve especial mention because, while short, they make extensive use of the protectible material of the original. "Miss Mix" is a wonderful burlesque of Charlotte Bronte's "Jane Eyre" in which "Rochester" becomes "Rawjester." All the salient points of the original story are disclosed but with comic twists.*** In "Lothaw" Bret Harte used characters, style, incidents,

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*Burnand wrote probably a hundred burlesques and parodies of plays and stories. (See Shepperson, p. 236.) A good example is his burlesque of Douglas Jerrold's "Black-ey'd Susan," (1829, Pub. in "19th Cent. Plays," Oxford Press) which was a famous English melodrama. The burlesque was presented in 1866 under the name of "The Latest Edition of Black-Eyed Susan: or, The Little Bill That Was Taken Up. An Original Burlesque". (Published by S. French & Sons.) An example of one of Byron's many burlesques, is his play "Miss Eily O'Connor" (1861, Pub. T. H. Lacy) which uses the entire story of Dion Boucicault's play "The Colleen Bawn" (1860; Pub. "19th Cent. Plays" Oxford Press.) Byron advertised his work as "Founded on the Great Sensation Drama of the 'Colleen Bawn'". Byron also burlesqued operas and his "La! Somnambula!" (1865, pub. S. French & Sons) uses the full plot of Bellini's opera of the same name which is still performed. It is interesting to note that in Byron's burlesque he three times uses the device of having a bell cord pulled which turns on a shower bath, drenching the unfortunate character hidden in the shower.

**Falk, "American Literature in Parody," Twayne, 1955, p. 14.

***See Shepperson, p. 235; Kitchin, p. 281.

sequence of incidents and story line in a burlesque of Disraeli's "Lothair" (1870). This parody is stated to have been "The most popular of all Harte's comic pieces . . . Like all of his similar works, it is piquant without being malevolent and critical without being dull."* In "Rupert the Resembler" (1902) Harte burlesqued Anthony Hope's "The Prisoner of Zenda" (1894), and included material appearing in Hope's "Rupert of Hentzau." In a comparatively few pages Harte uses the entire plot of "The Prisoner of Zenda," all its principal characters, and practically all of its important incidents but he transforms them into a delightful travesty.

The 19th century was also the high point of burlesque in America. Various minstrel companies frequently burlesqued story lines and incidents of serious dramatic plays. Dramatic burlesque in this country attained its height at the turn of the century with Weber and Fields. As fast as a serious play came out on Broadway, Weber and Fields burlesqued it in their Broadway Music Hall. [R. 142.] There was introduced into evidence in this case as an example of this type of burlesque the script used by Weber and Fields in their production of a travesty on "Arizona" [Ex. 17], the melodramatic Augustus Thomas play [Ex. 16]. This burlesque was produced within a month after the play opened and the burlesque starred such outstanding personages as DeWolfe Hopper, David Warfield, Faye Templeton and Lillian Russell. This Weber and Fields burlesque uses the entire plot line and much of the dialogue of "Arizona," transformed by independent talent into a completely different result.

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*See Shepperson, p. 236.

In the 20th century burlesque and parody have prospered with such literary figures as Max Beerbohm, Robert Benchley, S. J. Perlman, Ogden Nash, E. B. White, Wolcott Gibbs and James Thurber leading a distinguished field of humorists specializing in this *genre*. The English author Barry Pain has done a splendid burlesque of A. S. M. Hutchinson's best selling novel "If Winter Comes" (1921) in a little book entitled "If Summer Don't (1922, Fred A. Stokes & Co.),* which spoofs not only the style, but the whole Hutchinson story line and characters. Corey Ford has produced many modern burlesques including one of the popular "autobiography" titled "Cradle of the Deep" by Joan Lowell (1929, Simon & Schuster), in a book called "Salt Water Taffy: Or, Twenty Thousand Leagues Away From the Sea" (1929, G. P. Putnam & Sons), mocking the original chapter by chapter. [R. 138-139.]

There are many anthologies of parody and burlesque. Walter Hamilton, as early as 1888, published a six-volume collection entitled "Parodies of the Works of English and American Authors" (1885), containing about 4,000 parodies, most of them poetic. Other collections include "A Parody Anthology" (1904) by Carolyn Wells (377 pp.), "A Century of Parody and Imitation" edited by Jerrold & Leonard (1913) (391 pp.), and a recent work of Professor Robert Falk of UCLA entitled "American Literature in Parody" (1955) (276 pp.). Many of these are parodies of style rather than content. Furthermore, since much poetry is non-dramatic the parodist has no "story line" to use; however, in many in-

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*Mr. Pain assumed the *nom de plume* of "ABCDEF Notsomuchinson."

stances even in poetry the new author uses line after line of the original, changed but slightly in language but in such a deft manner that the whole poem is transformed into the ludicrous, and a perfect parody is created.*

II.

A True Burlesque or Parody of a Copyrighted Work of Literature Is a Fair Use and Not a Copyright Infringement.

The trial court held that "parodized or burlesqued taking is to be treated no differently from any other appropriation" and therefore that if there is "a substantial taking, infringement exists." 131 F. Supp. at 183. The court thus refused to recognize that the burlesquer and parodist has a right to make a "fair use" of copyrighted material.** This is the basic error of the decision below.

**E.g.* the parody of Longfellow's "The Day is Done" and Poe's "Raven" at pages 77 and 115 of Falk's "American Literature in Parody".

**There is no occasion to rely on "fair use" unless there *has been* a use of a substantial amount of protectible material. Use of an *insubstantial* amount of protectible material is not actionable regardless of the intent with which it is taken or the use to which it is put. (*Harold Lloyd Corp. v. Witwer,* 65 F. 2d 1 (9th Cir., 1933); *Kustoff v. Chaplin,* 120 F. 2d 551 (9th Cir., 1941); *Dymow v. Bolton,* 11 F. 2d 690 (2d Cir., 1926).) And so far as *unprotected* elements of the work are concerned—such as ideas, situations, themes, locale and settings, the bare basic plots and ordinarily the characters—the copyright owner does not acquire the right to prevent others from using them, however substantial the use may be. (*Nichols v. Universal Pictures Corp.,* 45 F. 2d 119 (2d Cir., 1930); *Dymow v. Bolton,* 11 F. 2d 690 (2d Cir., 1926); *Caruthers v. RKO Radio Pictures Corp.,* 20 F. Supp. 906 (S.D. N.Y., 1937); *Harold Lloyd Corp. v. Witwer,* 65 F. 2d 1 (9th Cir., 1933); *Echevarria v. Warner Bros. Pictures Corp.,* 12 F. Supp. 632 (S.D. Cal., 1935); *Schwarz v. Universal Pictures Corp,* 85 F. Supp. 270 (S.D. Cal, 1945); *Wiren v. Schubert Theatre Corp.,* 5 F. Supp. 358 (S.D. N.Y., 1933); *Roe-Lawton v. Hal E. Roach Studios,* 18 F. 2d 126 (S.D. Cal., 1927); *Maxwell v. Goodwin,* 93 Fed. 665 (C. C. Ill., 1899); *Gropper v. Warner*

A. The Principle of Fair Use Is Well Established.

The copyright monopoly is not absolute. Regardless of the protection which may otherwise be given a copyright owner against the TAKING, *animus furandi,* of his protectible literary material, he does not acquire the right to prevent USES of that same material which are necessary to promote the progress of science and the useful arts for the public benefit. Application of this principle has been made under what has come to be known as the doctrine of "fair use" which has been recognized "at all times and in all countries."*

In this country, the Federal Constitution makes a right of fair use inherent in every copyright. Copyright is a creature of statute,** and the power of Congress to enact copyright legislation is subject to the command that only such rights may be granted as will "promote the Progress of Science and useful Arts."*** The purpose of the

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Bros., 38 F. Supp. 329 (S.D. N.Y., 1941); *Burtis v. Universal Pictures Corp.,* 40 Cal. 2d 823 (1953); *Becker v. Loew's Inc.,* 133 F. 2d 889 (7th Cir., 1943).) In *Fendler v. Morosco,* 253 N. Y. 281, 171 N. E. 56 (1930), it is stated that such elements of a copyrighted work are "free as air".

**Farmer v. Calvert Lithographing etc. Co.,* 8 Fed. Cas. 1022, 1026, No. 4651 (C. C. E. D. Mich., 1872); see *Folsom v. Marsh,* 9 Fed. Cas. 342, No. 4901, at 344 (C. C. D. Mass., 1841); *Cary v. Kearsley,* 170 Eng. Rep. 679 (1802); *Bell v. Whitehead,* 8 Law Journal (N. S.) 141, 142 (1839).

**Ever since the decision in *Wheaton v. Peters,* 8 Pet. 591, 661, 1834, it has been settled that "the law of copyright is a creature of statute, and is not declaratory of the common law, and that it confers distinct and *limited* rights, which did not exist at common law". *White-Smith Pub. Co. v. Apollo Co.,* 147 Fed. 226, 227 (2nd Cir., 1906), aff'd 209 U. S. 1, 15 (1908). See also *Bobbs-Merrill Co. v. Straus,* 210 U. S. 339, 346 (1908); *Mazer v. Stein,* 347 U. S. 201, 214 (1954); *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.,* 216 F. 2d 945, 947 (9th Cir., 1954).

***Article I, Section 8 of the Constitution.

Constitution in authorizing Congress to grant rights to authors which had not theretofore existed was to benefit the public generally by stimulating intellectual creation. Reward to the author was to be only of secondary importance and as a means to secure such stimulation.*

Professor Chafee has epitomized the rationale of the doctrine of "fair use" as follows:

> "Nobody else should market the author's book, but we refuse to say nobody else should use it. The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others." (Chafee, "Reflections on the Law of Copyright," 45 Col. L. Rev. 503, 511.)

**Mazer v. Stein,* 347 U. S. 201, 219 (1954); *Fox Film Corp. v. Doyal,* 286 U. S. 123, 127 (1932); *United States v. Paramount,* 334 U. S. 131, 158 (1948); *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.,* 216 F. 2d 945, 950 (9th Cir., 1954). When the Copyright Act received its last general revision in 1909, the House Committee, in reporting the bill, said:

> ". . . It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.
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> ". . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . ." (Howell, "The Copyright Law," pp. 253, 260.)

See *Chamberlin v. Uris Sales Corporation,* 150 F. 2d 512 (2d Cir. 1945); *Martinetti v. Maguire,* 16 Fed. Cas. 920 (Cir. Ct. Calif., 1867).

And Mr. Saul Cohen in his article, "Fair Use in the Law of Copyright," has aptly pointed out the relation of the principle to the Constitutional provisions in saying:

> ". . . There is also a strong social interest in enriching our culture and stimulating activity of a literary and artistic nature. The purpose of granting copyrights is, in the words of the Constitution, 'To promote the Progress of Science and useful Arts.' To deny writers the fair use of copyrighted materials would have exactly the opposite effect. So, the law has been that a man may make use of the work of another 'for the promotion of science, and the benefit of the public.'" (ASCAP Copyright Law Syposium, No. 6, p. 43, at 49, published by Columbia University Press, 1955.)*

Literary criticism is an important example of a fair use, and it is closely analogous to burlesque and parody. The trial court recognized that "Reviews by so-called critics may quote extensively for the purpose of illustration and comment." 131 F. Supp. at 175. The quotations set forth below are statements of the well-established rule that if copyrighted material is legitimately used for purposes of the criticism, it is a fair use:

> ". . . no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the orig-

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*This essay, written for the current Nathan Burkan Memorial Competition, contains a discussion of practically all the English and American cases on the subject, including the burlesque and parody cases.

inal work, and substitute the review for it, such a use will be deemed in law a piracy." (*Folsom v. Marsh,* 9 Fed. Cas. 342, 344, No. 4901 (C. C. D. Mass., 1841).

". . . Thus, great liberty is exercised in permitting a reviewer to make extracts for the purposes of criticism, so long as such extracts are not made as a cover for a republication . . . On the other hand, if the selections are made *animo furandi,* with intent to make use of them for the same purpose for which the original author used them to convey in a different publication the information which he imparted, or to supplant him in his own territory, a small quantity will suffice to render the defendant liable to a charge of piracy. . . ." (*Farmer v. Elstner,* 33 Fed. 494, 496 (C. C. Mich., 1888).)

"A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. . . ." (*Hill v. Whalen & Martell, Inc.,* 220 Fed. 359, 360 (S. D. N. Y., 1914).)

". . . Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed. . . ." (*Lawrence v. Dana,* 15 Fed. Cas. 26, 61, No. 8136 (C. C. D. Mass., 1869).)

The reason that a critic may fairly use copyrighted material is that it is essential for him to do so in performing his function. Unless the critic could quote

substantial portions of the protectible property he is criticising, literary criticism would be severely handicapped and the public interest injured.

There are many types of fair use,* and no one definition adequately explains the many types of uses of copyrighted material which have been permitted. "On the whole, the tests [for fair use] are pragmatic," and the court is required to take "into consideration the particular circumstances of each case." Yankwich, "What is Fair Use?", 22 Univ. of Chicago L. Rev. at 213, 215.**

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*The courts have recognized numerous types of fair use other than criticism, though none is so closely analogous to burlesque and parody as is criticism. See for example *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E. D. Wis., 1941) (lyrics of the chorus of a copyrighted song written for the Green Bay Packers football team used in a magazine article about the Packers); *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S. D. N. Y. 1940) (thirteen lines of the lyrics from the chorus of a copyrighted song popular when Pearl White was starring in "Perils of Pauline" used in a magazine article about Miss White's death); *Shapiro, Bernstein & Co. v. P. F. Collier & Co.*, 26 U. S. P. Q. 40 (D. C. N. Y., 1934) (ten lines of the lyrics from an eighteen-line chorus of a copyrighted musical comedy song used in a magazine story in which the characters heard these excerpts from the musical comedy over the radio); *Bloom & Hamlin v. Nixon,* 125 Fed. 977 (E. D. Pa., 1903) (complete chorus of a copyrighted work sung as part of an imitation of another singer who had popularized the song.) *American Institute of Architects v. Fenichel,* 41 F. Supp. 146 (S. D. N. Y., 1941) (six copies of one contract form in a copyrighted book of contract forms reproduced and distributed by an architect to certain owners and contractors with whom he was dealing); *G. Ricordi & Co. v. Mason,* 201 Fed. 182 (C. C. N. Y., 1911) (copyrighted opera libretto used to prepare a brief and fragmentary description of the plot and characters of the opera—a synopsis—which was published in a book of opera stories); *Simms v. Stanton,* 75 Fed. 6, 10-11, 17 (C. C. N. D. Cal., 1896) (same breakdown of the divisions of the subject of phrenology published in a copyrighted book was used by another author who published a later book on the same subject).

**See also Cohen, "Fair Use in the Law of Copyright," ASCAP Copyright Law Symposium, No. 6, p. 43.

Essentially what is required in determining whether a particular use is fair is to "strike a scrupulous balance between the right of an author to the product of his creative intellect and his imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts which is the constitutional mandate in which the American law of copyright originated." *Ibid.* at 213-214.

In striking this balance between the author's rights and the public interest in the dissemination of knowledge, courts have emphasized various factors, depending on the type of the copyrighted work and the use made of it. The lack of intent to infringe was held significant in *Broadway Music Corp. v. F-R Pub. Corp.,* 31 F. Supp. 817, 818 (S. D. N. Y. 1940). Whether the "use" supersedes the original or materially reduces the demand for it has frequently been deemed decisive. *Hill v. Whalen & Martell, Inc.,* 220 Fed. 359 (S. D. N. Y. 1914); *Karll v. Curtis Pub. Co.,* 39 F. Supp. 836, 837 (E. D. Wis., 1941); *Folsom v. Marsh,* 9 Fed. Cas. 342, No. 4901 (C. C. D. Mass., 1841); *Lawrence v. Dana,* 15 Fed. Cas. 26, 136 No. 8136 (C. C. D. Mass., 1869); *Shapiro, Bernstein & Co., Inc. v. P. F. Collier & Son, Co.,* 26 U. S. P. Q. 40, 43 (D. C. N. Y., 1934); *Carr v. National Capital Press,* 71 F. 2d 220 (App. D. C., 1934). The fact that the use was merely a "servile copying" and the user did no original work may be controlling. See *Simms v. Stanton,* 75 Fed. 6, 16 (C. C. N. D. Cal. 1896); *Warren v. White and Wyckoff Mfg. Co.,* 39 F. 2d 922 (S. D. N. Y. 1930); *Hartford Printing Co. v. Hartford Directory & Pub. Co.,* 146 Fed. 332 (C. C. D. Conn., 1906).

Although the considerations in determining fair use seem diverse, the unifying element is the Constitutional provision. The Constitution requires that the copyright monopoly leave room for the dissemination of knowledge and the promotion of the useful arts. Under this mandate, the courts have approved where there is a bona fide use of copyrighted material which is necessary for the dissemination of knowledge or the fostering of a useful art.

B. The Burlesquer and Parodist Are Entitled to the Full Enjoyment of the Right of Fair Use.

Useful Art. Burlesque and parody comprise a useful art: They are a kind of literary criticism, for they induce appraisal of the original they burlesque; moreover, they entertain. The public interest in promoting this useful art entitles the author of a bona fide burlesque or parody to claim the broadest right of fair use. His purpose is to create a new work of art. He has no *animus furandi;* he takes nothing to adopt as his own. He does not purport to supersede or substitute for the original or to detract from it by satisfying any demand for its own qualities; on the contrary, by his individual creative efforts he produces something entirely different from the original, something itself new and delightful which has merit, not from what he used, but from what he did with what he used. He benefits from his *own* efforts. He is and should be limited to using such material as is reasonably necessary to accomplish his particular legitimate objective; he cannot use so much that he merely *reproduces* the original and thus destroys or substantially impairs its value. But within those limitations, he is entitled to make the use required by the art-form he is creating.

Use of pre-existing work. Like literary criticism, burlesque and parody of a particular literary work have one essential prerequisite: They *must* use a pre-existing work. In burlesquing the works of others, our most respected authors have used the story lines, incidents and even literal transcriptions of substantial parts of the "original" work. Unless an author has the right to use those elements of the original, this whole field of burlesque and parody must cease to exist as we know it now. The authorities recognize that under the doctrine of fair use previous works may be used for various purposes, even though the use is not indispensable to the creation of an independent work.* *A fortiori,* use of the prior work for purposes of burlesque, as for criticism, is fair because without such use, burlesque and criticism cannot exist.

A reading of even a sampling of the parodies or burlesques mentioned in the foregoing historical section (pp. 14-21) leaves no question but that the authors have used a substantial portion of the protectible material contained in the originals—no question but that they would have been guilty of copyright infringement if they had used the same amount in a serious work. Application of the standard enunciated by the trial court would mean that none of those works should have been written and no similar work can ever be written.

Commercial gain no disqualification. It is no bar to the right of fair use that the burlesque or parody is produced for "commercial gain." We believe that the trial court demonstrably erred in placing so much weight

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*See cases cited, footnote, p. 26.

on that factor. 131 F. Supp. 174-176, 183. Like most literary criticism (which unquestionably has the right of fair use) burlesques and parodies of course are written for "commercial gain." They always have been. Even the Greeks contended for the crowns of laurel which meant financial success. As this Court said in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System,* 216 F. 2d 945, 950, "Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well."

It is happily true that the financial returns to authors have increased vastly in the past half century with the advent of motion pictures, radio and television. Even our poets no longer inhabit garrets. But that fact does not make their works any the more a purely "commercial" undertaking. Nor does the fact of compensation change the character of burlesque and parody of the particular as an established, unique and desirable branch of the useful arts, entitled to the use of the works of others which it must make to produce its independent artistic creations.*

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*Burlesque and parody are distinguishable from the type of use proscribed in *Henry Holt & Co. v. Liggett & Myers Co.,* 23 F. Supp. 302 (D. C. Pa., 1938). There, in a pamphlet advertising Chesterfield cigarettes, the tobacco company included a quotation from a copyrighted scientific treatise in a manner which made it appear that the author of the treatise had consented to the use of his work for advertising purposes. Its use by the tobacco company was not necessary to promote the progress of science or the useful arts as is the case when parody or burlesque uses the burlesqued or parodied work. No attempt was made to use the treatise as a springboard for creating something new in science or art. The use was simply an unauthorized copying of copyrighted material under circumstances and in a manner which afforded no justification for such use.

A "commercial gain" test would make infringement depend wholly on the sale—even the salability—of the particular parody or burlesque rather than on its intendment, its nature or its content. A parody printed in the "Saturday Evening Post" for compensation would infringe; the same parody published by the author at his own expense and distributed without charge would not. This, although the Copyright Act deliberately omits the "for profit" qualification as a requirement to establish infringement in the case of books, poems or plays. (Sec. 1, Title 17 U. S. C. A.; see opinion below, 131 F. Supp. at p. 174.)

The circumstance that television may be a potent competitor to motion pictures for the entertainment audience does not affect the application to parody or burlesque of the principles of fair use. The same interest protects the right of the public to view these comic creations at home as protects its right to see them on the stage or to buy them at the book store. Certainly the advent of television did not have the effect of enlarging the author's monopoly under the Copyright Act so as to permit him to prohibit or control an art previously unfettered.

The "Eternity" decision. There is convincing proof that since the decision in this case, Trial Judge Carter has himself reached the conclusion that the principle of fair use may authorize the parodist or burlesquer to use at least *some* copyrighted material. In September, 1955, some four months after the opinion and judgment in this case, there came on for trial before Judge Carter the *second* case squarely presenting the issue of the right to burlesque or parody a copyrighted work. Columbia Pictures Corporation, the producer of the award-winning

motion picture "From Here To Eternity," sued the National Broadcasting Company for an injunction and damages because of its television broadcast of a burlesque of that motion picture, featuring the well known comedian Sid Caesar and entitled "From Here to Obscurity." On January 5, 1956, Judge Carter entered a judgment in favor of the *defendant,* holding that *this* burlesque was not a copyright infringement.* In his conclusions of law Judge Carter said, "Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." [Concl. 7.] However, Judge Carter limited the extent of the doctrine in this type of case by declaring that it could not extend "to the use of the general or entire story line and development of the original with its expression, points of suspense and build up to a climax."

Use of the story line. A rule automatically excluding use of the story line from permissible "fair use" does not make sense either from a legal or a literary standpoint. Almost invariably a criticism or review of a book or motion picture sets forth the story line, and yet, as we have shown, such criticism is uniformly held to be a fair use. Moreover, it has been held that a brief synopsis

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**Columbia Pictures Corp. v. National Broadcasting Company,* ..... F. S..... While Judge Carter did not file a written opinion, we understand his Findings of Fact and Conclusions of Law will shortly be published in the Federal Supplement. Notice of appeal to this Court was filed by plaintiff Columbia Pictures Corporation on February 2, 1956.

of an opera printed in a book of such synopses does not infringe the copyright in the libretto. (*G. Ricordi Co. v. Mason,* 201 Fed. 182 (S. D. N. Y., 1911.)

Freedom to make a fair use of the story line as well as other portions of copyrighted material is essential to the preservation of burlesque and parody. Some of history's most prominent burlesques used the story lines of their originals. Fielding's "Shamela," Thackeray's "A Legend of the Rhine," Bret Harte's "Miss Mix," Corey Ford's "Salt Water Taffy" and Weber and Fields' whole series of Music Hall skits are well known examples.

Fair use does not depend upon what is used, but rather upon what is done with what is used, and the result it has. Where the purpose is legitimate, the amount taken is not decisive *per se.* Yankwich, "What is Fair Use?", 22 Univ. of Chicago L. Rev. 203, 208-209; Weil, "Copyright Law," p. 432. One writer may take but an incident and so treat it as to be an obvious infringement (*cf. Hill v. Whalen,* the "Mutt and Jeff" case, 220 Fed. 359); another writer like Fielding, Thackeray, Bret Harte, Corey Ford or Weber and Fields may take detailed matters, even dialogue, and it will be no infringement. As Judge Yankwich says:

> ". . . It follows that a rigid formula which would apply to parody and burlesque the sole test of substantiality of copying to be determined by similarity of sequence or 'order of events' in story development, and which would disregard all others, finds no support in the literary history of the English-speaking world. More, the use of such a formula would destroy the comic art, so important and rare, of which parody and burlesque are a part." (Leon R.

Yankwich, "Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Rev. 1130, 1154 (1955).)

Use of material in public domain or by consent. The right of fair use is essential to the continuation of parody and burlesque as a useful art. Use of public domain material, as suggested by the trial court (131 F. Supp. at 185) would not give parodies and burlesques the freshness and timeliness which is the key to their effectiveness. Moreover, after the expiration of a 56-year copyright, none but the very greatest classics would survive in the public mind and would thus be available for the art. Even less satisfactory is the trial court's suggestion that parodists and burlesquers use material by authors who have given consent. 131 F. Supp. at 185. Human nature being what it is, authors whose works most need the pin prick of parody would be the least likely to consent.

To limit burlesque use to material in the public domain or by consent would promote neither the useful arts nor the public interest. Freedom of thought is under attack today as it never has been since the Middle Ages. This is no time to suppress or limit forms of art capable of expressing thoughts humorously. We need to preserve those art forms which bless us with a saving balm of clean, hearty laughter. That, the burlesque of the particular has always done and continues to do.

C. The Right of Fair Use for Burlesque and Parody Is Consistent With the Authorities.

While the issue in this case has never been the subject of a square decision by any court, the cases which have discussed the problem appear clearly to support a right of fair use for parody and burlesque.

1. The English Cases.

In *Glyn v. Western Feature Film Co., Ltd.,* 1 Ch. 261, 114 L. T. Rep. 354 (1916), the author of the somewhat notorious "Three Weeks," Eleanor Glyn, brought a copyright infringement action against the defendant who had produced a motion picture entitled "Pimple's Three Weeks (Without the Option)," which included a burlesque of some of the incidents in the book. One of the defenses was that the film "is a mere burlesque of the plaintiff's novel and that a genuine burlesque of a serious work constitutes no infringement of copyright." The case was decided upon the ground that the plaintiff's work was so immoral as not to be entitled to copyright protection, but the court referred to the above quoted defense as follows:

> "Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it is certainly remarkable that no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of estab-

lishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original, and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found involved in such observations as those of Lord Lindley in *Hanfstaengl v. Empire Palace* (*ubi sup.*) at p. 128, or in such a decision as that of the Court of Appeal in *Francis Day and Hunter v. Feldman and Co.* (*ubi sup.*), or in the principle that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken, and has subjected it to such a revision and alteration as to produce an original result. . . ." (P. 356.)

The other English case on burlesque is *Carlton v. Mortimer,* MacGillivray, "Copyright Cases," 1917-23, p. 194, wherein the owners of the dramatic rights in a book entitled "Tarzan of the Apes" claimed infringement by reason of a comic acrobatic performance under the title of "Warzan and His Apes," which used two incidents from the book. The court held (in MacGillivray's words):

". . . In the book both these features were serious, perhaps they might be described as sentimental. In the defendant's performance they were both comic to the last degree. They were intended to be comic and produce nothing but laughter. So far as these incidents might be said to be taken from the book, he was satisfied that they were a mere burlesque of these incidents. Without going to the extent to which he understood Mr. Justice Younger went into the case of Glyn v. Western Feature Film

> Co., 1916, 1 Chancery 261, in saying that a burlesque never can be an infringement of copyright, he was of opinion that the burlesquing of these two trifling incidents and the production of the performance under a title which was somewhat similar in sound to, but different in fact from, the title of the novel did not amount to an infringement of the plaintiff's rights. . . ."

Hanfstaengl v. Empire Palace, 70 L. T. Rep. N. S. 854 (1894), referred to in the *Glyn* decision, was a case in which the defendant had printed drawings in its newspaper of living tableaux depicted on the stage of a theatre, which tableaux were in turn representations of copyrighted pictures. For the purpose of their decision the judges treated the sketches as having been made *from the pictures themselves,** but found no infringement. Lindley, L. J., after pointing out that fair reviews of literary works may properly contain lengthy extracts from the original and referring to the consideration to be given "the object sought to be attained by the copies complained of," states:

> ". . . Guided by the foregoing considerations and by the principles acted upon in the decisions to which I have referred, I ask myself whether these sketches are such copies of the plaintiff's pictures, or such reproductions of the designs thereof, as are struck at by the statute which confers copyright in such pictures. My answer to this question is, No.

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*Judge Carter dismissed this case from consideration on the ground that the decision was limited to a holding that a "copy of a copy which is not itself a copy of the original does not infringe." 131 F. Supp. at 180. He overlooked the fact that each judge in giving his opinion expressly refused to rest the decision on this narrow ground.

The sketches are not intended to be, and are not in fact, copies of the pictures at all, neither are they intended to be, nor are they in fact, reproductions of the designs of the pictures. They do not represent any of the beauties of the pictures. They are rough sketches, *made for a very different purpose and answering a very different purpose,** that purpose being, not to give an idea of the plaintiff's pictures, but to give a rough idea of what is to be seen at the Empire Theatre. . . . *The amusing sketches in Punch of the pictures in the Royal Academy are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves.* The application of similar principles to the different facts of this case leads me to a similar conclusion. In neither case is there any piracy, actual or intended. . . ." (Pp. 860-861.)

Davey, R. J., states in his opinion:

". . . The pictures of which these sketches are said to be piratical copy or reproduction are works of art calculated to please the eye and the taste by a beautiful arrangement of form and colour, and to excite the emotions by the scenes depicted and thoughts suggested by the imagination or fancy of the artist. As objects of attraction *they depend not on the mere outline or configuration, but on the artistic feeling and power with which the subject is treated.* The sketches before us are mere outlines, descriptive, more or less accurate, of the grouping and pose of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of everything which makes the pictures works of art,

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*Throughout this brief, emphasis in quotations has been added unless otherwise noted.

and constitutes their claim to protection under the Act. . . . The point is not that these things are bad copies, but that *they are not intended and do not purport to reproduce the value and essential qualities of the pictures as works of art, and are, therefore, not copies or reproductions at all within the meaning of the Act.*" (P. 862.)

2. The American Cases.

The one American case which involves burlesque or parody in any way is *Hill v. Whalen & Martell, Inc.,* 220 Fed. 359 (S. D. N. Y. 1914). There plaintiff was the exclusive licensee of the dramatic rights to the well known cartoon "Mutt and Jeff." Defendant produced a dramatic performance entitled "In Cartoonland" in which he introduced characters called "Nutt" and "Giff", who were costumed exactly like the cartoon characters and whose actions and speech were in harmony with the spirit of the cartoons. It was as palpable a steal as could be imagined. See *King Features Syndicate v. Fleischer,* 299 Fed. 533, 536 (2d Cir., 1924). Defendant in the *Hill* case had the temerity to claim his use was a "burlesque," perhaps referring to the type of theatre in which it was performed. The court properly denied his claim. The cartoon strip itself was a burlesque of human nature, and one certainly cannot burlesque a burlesque. In its decision, however, the court stated:

> "A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. . . .
>
> "One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much

> as has been reproduced as will materially reduce the demand for the original . . . The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.
>
> "In this case, I am satisfied that the representation of defendant's 'In Cartoonland' was calculated to injuriously affect, and that to a substantial degree it did so affect, the value of complainant's copyright. Those who saw 'Nutt' and 'Giff' would have less keen a desire to see 'Mutt' and 'Jeff'. . . . A good many of them would probably think that they had already seen those characters. They would not be far wrong in so thinking. . . ." (P. 360.)

This case thus stands squarely for the principle of fair use, and the limitation on that principle, for which we contend.

The trial judge discussed three early American cases involving mimicry by a performing actor. In *Bloom & Hamlin v. Nixon,* 125 Fed. 977 (E. D. Pa., 1903), the singing verbatim of the complete chorus of a popular song as a part of an imitation of another singer was held a fair use. The same decision was given in *Green v. Minzensheimer,* 177 Fed. 286 (S. D. N. Y., 1909), where one verse and a chorus was sung. On the other hand, in *Green v. Luby,* 177 Fed. 287 (S. D. N. Y., 1909), the whole song was used in connection with the imitation of another singer, and it was held not a fair use.

These cases do not involve literary burlesque at all. In each of them the plaintiff was the owner of a copyrighted song and all or a part of his work was produced verbatim in the same form and manner as it might be presented by any commercial licensee of the right to perform a song. There was no attempt to transmute or change it in any way. Literary creation—authorship—by the accused was not involved.*

3. Textbooks and Treatises.

Uniform support for the position that bona fide parodies and burlesques are "fair uses" is found in American textbooks and treatises, some of which are quoted below:

> "A bona fide burlesque is not an infringing copy. . . . A geunine burlesque of a serious work is not an infringement."
>
> 13 C. J. 1113, 1118.

> "A recognized form of review, although its nature is not always fully appreciated by its victims, is parody. It is entirely within the limits of fair use to make parodies or literary perversions of copy-

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*Similarly, *Leon v. Pacific Tele. & Tele. Co.*, 91 F. 2d 484 (9th Cir., 1937), which Judge Carter cited, has very little, if anything, to do with the question of burlesque or parody of another's literary work. In the *Leon* case the plaintiff had compiled a telephone directory. Working from that directory alone, defendant physically rearranged it to place the information in a different order. He made no attempt to gather his own information or to do any original work whatever, although the field was open to him. See *Hartford Printing Co. v. Hartford Directory & Pub. Co.*, 146 Fed. 332 (C. C. Conn., 1906). He neither added to nor changed the plaintiff's material in any way. There was nothing involved on the defendant's part except the act of copying plaintiff's listings verbatim.

righted works, even, it seems, in the form of drawings or cartoons."

Weil, "Copyright Law," p. 432.*

"It is well settled that a parody is not an infringement of the right to copy . . . A peculiar application of the doctrine [of fair use] is also found in the law relating to parodies which often approach actual copying but have always been held legitimate."

De Wolf, "Outline of Copyright Law," pp. 97, 142.

See also Spring, "Risks and Rights", pp. 177, 183, 186; Cohen, "Fair Use in the Law of Copyright," *op. cit.* p. 54, *et seq.;* Lindey, "Plagiarism and Originality", p. 43.

Judge Leon Yankwich has written an article on the subject of "Parody and Burlesque in the Law of Copyright" in the December, 1955, issue of the Canadian Bar Review. After a careful review of the history of the art and of all the cases, he expresses strong disagreement with the position of the trial court upon this issue. Judge Yankwich says:

"The law of copyright must be equated with the primary purpose of promoting the progress of science and arts. 'Fair use' was evolved as a concept by the courts in the English-speaking world with a view to aiding the development of science and arts by allowing use of copyrighted materials despite the monopoly of copyright. Its application to parody

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*The trial judge's statement that "Weil, Ball and Amdur are specifically contrary to defendant's position" (pp. 180-181) overlooks the fact that the comments of these writers to which he refers as being "contrary" all deal with the mimicry cases. As we have pointed out, these cases do not at all involve the same elements of use as exist in the case of burlesques or parodies of literary works.

and burlesque must take into consideration the elements the courts have applied to it, namely: (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; and (3) the result of their use upon the demand for copyrighted material.

"If, however, we confine its application to the first element only—the quantitative and qualitative element, applicable when material is used directly, in serious reproduction—we in effect reject, or restrict unduly, its application to parody or burlesque. In the light of literary history and the purposes of the copyright laws, we should extend rather than constrict the boundaries of 'fair use.' The controlling question should be, not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person's intellectual creation. 'Fair use' thus becomes determinable in the light of all the valid judicially established criteria, including the result to be achieved,, and in consonance with literary reality. . . ." (P. 1152.)

D. The Burlesque, "Autolight," Is a Fair Use of "Gaslight."

"Autolight" was an undisguised burlesque of "Gaslight." To burlesque, it necessarily had to use recognizable elements of "Gaslight" to remind the audience of that picture. Otherwise the burlesque had no point. But it took only what was reasonably necessary to produce the new artistic creation—the burlesque. It was, in short, a fair use of the copyrighted material in "Gaslight."

The great force and impetus of the picture "Gaslight" is created through the building up, brick by brick, of an entire structure. Each scene adds its small but effective strength and weight to the development of the picture's

tone. The imaginative treatment of incidents, scene by scene, creates the motivation and characterization and the heightened atmosphere of suspense which culminates finally in the sweeping climax. It was not the bare bones of the story that gave "Gaslight" its values; it was the expression, treatment and development of those bare bones—the deft way in which the author projected into reality an idea. The plot structure of "Gaslight" was of course necessary, but the skill or genius of the author did not lie in its concoction, nor did the value of the play to the beholder arise from it.

The writers of "Autolight" used absolutely none of the expression, treatment or development that made "Gaslight" a good, or even a great, motion picture. They used its bare bones—the greatly abbreviated story line and a very few of its incidents. They mocked in an exaggerated and ludicrous fashion the leading characters in the same fashion as has been done immemorially. What they did with these bare bones was to adorn them with their *own* treatment, expression and development, thereby creating something new. They could not have created a burlesque of "Gaslight" without using at least these bare bones or their equivalents.*

Everything that was serious, tense and dramatic in the original becomes hilarious in the burlesque. The whole tone of the original which the title, the setting, the cast, and the naked events have recalled to mind, is instantly transformed into the comic. Each happening that had its tremendously dramatic impact on the viewers of "Gaslight" is subjected to a contrast with absurdity. Each full-statured character is contrasted with its carica-

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*Dr. Baxter contrasted the literary values of the two works [R. 153-155].

ture. The wife is terrified—of Jack Benny! Her forgetfulness consists of hiding a horse in a closet! The detective doubles as a carpenter—he knows about the house because he built it! And so on.

In the entire motion picture there is not even a single chuckle and almost never a smile; in the burlesque there is scarcely an instant's interruption of the audience's laughter. That result is produced, and could only be produced, by reason of the talents and ability for the construction of comedy possessed by the writers of "Autolight"—talents and abilities which in their very different way are perhaps equal to those of the writers of "Gaslight", and which are exercised just as much, if not more, in creating this burlesque as they would be in creating any other comic work.

The contemporaneous reviews of the motion picture "Gaslight" appearing in periodicals gave to the public much more information concerning the picture—much more of the story line—than could ever be obtained from watching the 15-minute performance of "Autolight."* Yet, as the cases cited above (pp. 24-25) make clear, no infringement of copyright could be claimed by Loew's against any of the newspapers or magazines which reviewed the original motion picture. The use which "Autolight" made of the bare bones of "Gaslight" was as much a fair use of appellant's copyrighted material as was the more extended use of the same bare bones in the allied but no more firmly established field of critical review.

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*See "Life," May 22, 1944; "Time," May 22, 1944. "Life" contained four full pages of pictures and comments outlining the story in detail and comparing the motion picture with the stage play.

Not only did the writers of "Autolight" use less than the very reviewers who reviewed the picture, but far less than did the authors of most of the burlesques and parodies we have discussed. (See pp. 14-21, *supra.*) And just as was the case in those works, every element which Benny's writers used was changed, inverted and metamorphosed into a diametrically opposite set of literary values from those created by the authors of "Gaslight." It was what the authors of "Autolight" *did* with the bare bones of "Gaslight" that produced this new and original and extremely funny television program.

"Autolight" is no plagiarism. Nobody could possibly think on seeing "Autolight" that he was seeing a performance of "Gaslight," or that he was seeing a copied version of "Gaslight." Upon seeing "Autolight," the viewer would no more be deterred from seeing "Gaslight" than he would have been by the fact that he read the story in the reviews in the current newspapers and periodicals. The two works are so diametrically opposite that neither could in any way supersede or be a substitute for the other. They are directed towards two entirely different facets of human emotion and interest.

"Autolight" was a new and independent literary work. It was not a "servile imitation" as Lord Mansfield put it.* It had its own values and its own place in the field of entertainment. It was a creative work in an established field of useful art. The use of copyrightable material necessary to its production as a work in that field was a fair use in accordance with the Constitution's command that the copyright law shall "promote . . . useful Arts."

**Sayre v. Moore* (Eng. 1785), 1 Easts Reports 359.

III.

The History of the Copyright Act and Long-established Custom Constitute a Statutory Construction That the Burlesquer and Parodist Have the Right of Fair Use.

The first Federal Copyright Act was passed in 1790 and covered only maps, charts and books. By the revision of 1831, musical compositions were added and the term of years extended. In 1856 the author of a dramatic work was given the performance rights as well as the publication monopoly. In the complete revision of the Act in 1870, other works such as statuary and models were added to the protectible items and the author was permitted to reserve rights of dramatization and translation. The last complete revision of the Act took place in 1909, but, other than granting a dramatist the right of novelization, it made no substantial change in the rights protected with respect to books or plays.

No rights exist in appellees except as created by the statute. Consequently, if they are to prevail, they must establish that Congress intended from 1790 on to grant the right to copyright owners to prohibit burlesques of particular books, and from 1856 on to prohibit the performance of dramatic burlesques. During the entire period since long before 1790 to the present date, literary and dramatic burlesques of particular works, using story line, characters and situations as a springboard for new, imaginative and creative efforts, were not only common, but increasingly so. Such burlesques were the publicly accepted custom. Under these circumstances, if Congress had intended that authors should be protected from having their works burlesqued or parodied, "it would seem," as this Court said in a closely analogous circumstance, that

"Congress would have made specific provision therefor." *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 950 (9th Cir., 1954); see *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1 (1908). Yet Congress has taken no action indicating any intent to limit the rights of the parodist or burlesquer. The acquiescence of Congress in the publicly accepted custom of burlesque is a legislative recognition that the Act never was intended to and did not prohibit such custom.

Not only Congress, but all of those concerned have acquiesced in the understanding that the burlesquer and parodist have a right of fair use. As we have shown, literary history abounds with examples of the burlesque of the particular, using "substantial" portions of protectible property measured by the ordinary infringement tests. Yet in all recorded history no author or copyright proprietor (with the sole exception of Eleanor Glyn and perhaps the licensee of "Tarzan and the Apes") has ever before made legal claim that a bona fide burlesque or parody of any book or play was an infringement of its copyright.

Almost from their inception, radio and television have burlesqued books, plays, and especially motion pictures. The evidence shows that since 1932 Jack Benny alone has presented burlesques of sixty-three current motion pictures, including those produced by all of the leading production companies. [R. 57-61.] If the motion picture companies had been of the opinion that a burlesque of their expensive pictures constituted an infringement of their valuable statutory rights therein, they would have long since made that position clearly known. Yet as far as this record shows, no other motion picture company,

author or other person even made a protest against such use on legal grounds during all these years until appellees made their first complaint on January 30, 1952.

Where all of the people so immediately concerned—authors and publishers of literary and dramatic works and producers of motion pictures, including appellee Loew's—have acquiesced for a long period of years in the understanding that the use was not an infringement, it constitutes an interpretation of the Act which is entitled to substantial weight under established rules of statutory construction. *United States v. State Bank of North Caroline,* 6 Pet. 29 (1832); *United States v. Farrar,* 38 F. 2d 515, 517 (D. C. Mass., 1930); *Wells Fargo & Co. v. Mayor and Alderman of Jersey City,* 207 Fed. 871 (D. C. N. J., 1913); 50 Am. Jur., Statutes, Secs. 319-320, p. 309.

The trial judge refused to accept this argument on the ground that appellants did not prove that the literary burlesques and parodies in the long history of the art were done over the objection of the authors burlesqued. This ground misinterprets the contention. We are not relying upon any established *custom to infringe* as supporting a continuation of a right to infringe; we are asserting that the failure of anyone to claim that a burlesque or parody *was* an infringement is evidence of the generally accepted belief that the copyright law did not extend to protection against this type of use.

Moreover, we do know that many authors objected to having their works burlesqued [R. 160], although it is of course not now possible to prove that *every* author was displeased. Richardson never forgave Fielding for "Shamela." (Shepperson, p. 28.) "We find Wordsworth, Arnold, and Browning resenting the parodying of their works. Browning fiercely declined to have certain

poems of his appearing side by side with parodies of them." (Kitchin, p. xviii.) And we suggest that the Court may take judicial notice of the natural human resentment at having a work of art created through loving labor set up as a target for laughter.

Another fact demonstrates both the general acquiescence in the proposition that burlesque and parody do not constitute copyright infringement and the validity of the assumption that consent to burlesque was neither ordinarily sought nor secured. It is well settled that if an author voluntarily permits the publication of his material or any substantial part thereof and fails to accompany such publication with the required notice of copyright, he loses forever his copyright in that material. *Deward & Rich Inc. v. Bristol Savings & Loan Corporation,* 120 F. 2d 537 (4th Cir., 1941); *Atlantic Monthly Co. v. Post Pub. Co.,* 27 F. 2d 556, 559 (D. Mass., 1928). Yet to our knowledge no published burlesque or parody contains copyright data concerning the work parodied, although of course many, if not most, burlesques and parodies are of copyrighted works. It must follow that the author of the original did not give his permission to use his work, or if perchance he did, he did not consider such use was an infringement of his copyright; otherwise, he would have insisted on its protection by proper copyright notice.

American courts have been uniformly hesitant to extend copyright protection by interpretation, preferring instead to leave such matters to Congress. *White-Smith Music Co. v. Apollo Co.,* 209 U. S. 1 (1908); see *Fitch v. Young,* 230 Fed. 743, 745 (1916). In accordance with that wise policy, if the parodist's or burlesquer's right of fair use is to be limited in some way after all

these years, the matter is one for the careful consideration of Congress in whose hands the Constitution placed power to grant copyright monopolies.

Conclusion.

If the useful art of burlesque and parody is to flourish in the future as it has in the past, burlesquers and parodists must have a right to make a fair use of copyrighted material. This right of fair use is supported by the constitutional provision authorizing copyrights, by cases which have adverted to the problem, by text books and treatises, and by decisions in analogous cases. The burlesque "Autolight" was a new, independent, and wholly different work from the motion picture "Gaslight," and could not have been created without the use of protectible material from that motion picture. Its use of such material is a fair use and not a copyright infringement.

For the foregoing reasons, appellants submit that the decision of the Trial Court should be reversed.

Respectfully submitted,

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February, 1956.

APPENDIX.

Synopsis of Gaslight.

The motion picture "Gaslight" is a tense and gripping psychological drama. Its theme is that of the attempted destruction of one human being by another solely through pressure on the mind. It has but three protagonists—the husband, the wife and the detective. The husband, portrayed by Charles Boyer, combines obsession and sadism, on the one hand, with a never-to-be-lost charm and fascination on the other. The wife, portrayed by Ingrid Bergman, presents the tragic spectacle of a loving, gentle, animated spirit, slowly but certainly being driven to the brink of madness, not by physical cruelty, but by subtle, psychological pressure of a subtle and horrible character. The detective is the *deus ex machina*—the active means by which the dilemma is resolved.

The atmosphere is set in the opening scene where the young girl, Paula Alquist, accompanied by the kindly family solicitor, drives off through the fog-shrouded streets of London from the home where her aunt has been brutally murdered by an unknown killer. The scene immediately shifts to a bright and sunny Italian locale. This is the background for an idyllic love affair between Paula and the utterly charming and romantic music student, Gregory Anton, culminating in their marriage and honeymoon in the Lake Como region of the Alps. The audience is made to hope that the tragedy in Paula's life is over and that nothing but happiness lies ahead. The return to London and to the oppressive atmosphere of the old house creates foreboding, but there is still no real hint of the mental drama about to be unfolded between husband and wife.

Paula discovers a letter written to her aunt by a "Sergius Bauer," and Gregory demonstrates a flash of sinister concern over that discovery although it is deftly passed off by the husband as solicitude for his wife. From that moment the subtle attack on Paula's mind begins to unfold. The fact that Gregory is not the gentle, romantic person that Paula believes is developed by sequences involving a vicious little housemaid, other servants, and an intrusive spinster.

The pressure on Paula's mind soon takes form. A family heirloom given to her by Gregory is unaccountably "lost," and it is impressed upon her by her husband that this is but one of a number of similar "losses." He suggests to her that she may be losing her mind and she is forced into an acute fear of leaving the house. At the same time we see still another side of Gregory in his obvious lust for jewels. In the meanwhile, the detective has commenced his investigation of the occupants of the house and new pieces of the puzzle fall into place. We learn that Paula's aunt was murdered for her priceless jewels which have never been found. The detective places the house under surveillance.

The mental pressure upon Paula becomes relentlessly greater. She is made to feel almost an interloper in her own home and before the servants. In an apparent sudden change of character Gregory offers to take her to the theatre to her almost hysterical joy. This is but another turn of the screw, however. Dramatically he crushes her through the device of accusing her of removing a picture from the wall, and by confrontation of her in the presence of the servants, heaps humiliation and shame upon her.

Furthermore, strange things happen in the house itself. Each night after Gregory leaves, ostensibly to work on

his music, the gaslight dims and the house is filled with fear-inspiring noises from the attic.

The climax to this mental torture comes when Paula, trying to escape from herself, forces her husband to attend a reception with her only to have him there "prove" by the device of a missing watch that she is mad. Hysterically she rushes home where Gregory deals the final blow, telling her that her mother had died of insanity (a palpable falsehood). He informs her that he is prepared to have her committed to an asylum for the insane.

But he has not yet won. The detective has by now put his case together. When Gregory is away on one of his nightly excursions, he forces his way into the home, and in a scene of great drama explains to her the terrible plot of which she has been the victim. At the very moment Gregory is in the attic above the house searching again for the missing jewels of the woman he murdered. He had hoped by driving his wife mad to inherit the house so that the search might be facilitated. The detective leaves to arrest Gregory, who, however, returns to the house by a different route. Discovering that his papers have been tampered with, he realizes he must act quickly. He confronts Paula whose mind has been so crushed that he easily induces her to believe that the detective himself was a dream.

The denouement comes immediately when the detective returns, seizes Anton after a short struggle and ties him to a chair. Paula asks to speak to her husband alone. Exercising all of his undeniable charm, he mentally forces her to secure a knife, apparently to cut him free. Instead, struggling as she is against what has happened to her, she throws the knife away, hysterically crying, "Whatever you have done, I could have pitied and protected you.

But, because I am mad, I hate you, because I am mad, I have betrayed you, and because I am mad, I'm rejoicing in my heart without a shred of pity, without a shred of regret—watching you go with glory in my heart. Mr. Cameron! Come! Come, Mr. Cameron! Take this man away. Take this man away!

This is a picture of suspense and sustained horror, but not the horror of the Frankenstein monster or the ape men. The horror is created by a diabolical form of mental torture. Never is the audience permitted a letdown. The few small touches of humor—the inquisitive nosiness of the neighbor, the pert flippancies of the housemaid, a touch here and there of Cockney dialect—serve only to intensify the effect of the dramatic matters which precede and follow.

Synopsis of Autolight.

The television play or skit, running for 15 minutes as compared with the 1 hour and 40 minute long motion picture, uses only two of its basic incidents: (1) The episode with respect to the picture on the wall, and (2) the denouement of the disclosure by the detective, the capture of the husband and his final failure to induce his wife to free him. The rest of the elaborate development of the motion picture plot is compressed into a single line of spoken introduction, "Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane."

When the curtain rises, we see the same type of stuffy, ornate living room that appeared in "Gaslight." The servants on stage are decorously dressed; yet a note of in-

congruousness is immediately injected by the size of the feather duster. The dramatic entrance of the wife, Bella (purposely overacted by Miss Stanwyck), certainly stirs memories of Miss Bergman, but it is brought sharply into its proper place in the scheme of this skit when we are told of the contents of the luncheon ordered for her by her husband—marinated salami with sour cream, to be eaten through the use of chopsticks. Benny's dramatic entrance as Charles, the husband, garbed *a la* Boyer, is an intentional slice of ham. The very way in which he removes his gloves, finger by finger, contributes to the hilarity.

From this point on the gags come thick and fast. The dramatic scene of the lost picture gets its belt with the fool's bladder when Jack slyly turns a portrait of a woman upside down and her hair, hanging downward, falls out of the picture. The butler is called in; it proves to be Rochester, who speaks comic English with a Harlem accent and indulges in topical gags. Benny's imitation of Boyer tugging sternly on the bell rope is followed by a shower of plaster which he accepts with the customary Benny injured and stoic innocence. The entire scene is filled with verbal and physical gags delivered in overacted seriousness. Bella's hysterical scream that confinement in her room is driving her mad is followed by an example of that confinement—"Breakfast in bed, lunch in bed . . . I couldn't have dinner in bed, it was full of dirty dishes." Benny emphasizes his wife's forgetfulness by pointing out that "Yesterday when we came back from the fox hunt, you hung your riding habit in the stable and put the horse in the closet."

After Jack's melodramatic exit, and with the entrance of the detective the fun becomes fast and furious and the

gags run wild. He is mistaken for the husband, with the expected result of an affectionate greeting by Miss Stanwyck, which is a most pleasant surprise to him. When he tries to hide in the closet to avoid discovery by the husband's return, there *is* the horse, big as life. To sustain him during his period of hiding, he also gets the marinated salami. Returning, Jack announces his intention of sending his wife away because of her habit of "turning everything upside down." As an appropriate gag, the butler (Rochester) arrives walking on his hands and carrying a tray on his feet.

The climax comes quickly. Bella accuses her husband of being a murderer; he purports to strangle her, but she is saved by the detective who emerges from the closet where he has been confined with the marinated salami, asking, "Pardon me, but do you have any rye bread?" Jack is duly tied and the couple is left alone. Jack pleads with her to get the knife and cut him loose, to which she, with a fiendish look in her eyes, says, "Yes, Charles, I am going to cut you *very* loose," and coming towards him with a knife gives her curtain speech (a travesty of Paula's hysterical outburst at the close of the motion picture):

> "Crazy? . . . Maybe I am . . . But it was you who drove me to it . . . It was you who turned the pictures upside down. . . . It was you who turned the lamp upside down and almost convinced me that I did it. . . . Then you turned the table upside down . . . the desk upside down

. . . One day I baked an upside down cake and you turned it rightside up. . . .

JACK

"Bella!

"(AS BARBARA GOES FOR HIS NECK WITH KNIFE, THE GIRL ACROBAT COMES ON AND KEEPS DOING HAND SPRINGS ON STAGE TILL FINISH.)

JACK

"Bella, don't kill me . . . don't kill me!

BARBARA

"No, I won't kill you. That's too good for you. I'm going to let them take you away . . . INSPECTOR . . . INSPECTOR . . .

"(SHE GOES TO THE BELL ROPE AND PULLS IT . . . BOB [detective] COMES IN AS PLASTER AND BRICKS FALL FROM CEILING ALL OVER EVERYTHING.)"